

STATE OF MICHIGAN
COURT OF APPEALS

MAURICE GREEN, MONICA BYRD, and
CLIFTON GREEN, as Personal Representative to
the Estate of DELLA GREEN, deceased,

Plaintiffs-Appellants,

v

VOYAGER PROPERTY AND CASUALTY
INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
September 24, 2002

No. 234003
Wayne Circuit Court
LC No. 00-027602-CK

Before: O'Connell, P.J., and Griffin and Hoekstra, JJ.

PER CURIAM.

In this insurance policy coverage case, plaintiffs appeal as of right the trial court's grant of summary disposition in favor of defendant. We affirm.

In November 1999, the deceased, Della Green, underwent a colonoscopy on an outpatient basis. The next day, family members found Green unconscious at her home. Despite medical efforts to resuscitate her, Green died. Green had purchased an insurance policy with defendant and when plaintiffs attempted to collect death benefits under the policy, defendant denied the claim. Thereafter, plaintiffs filed a two-count complaint alleging breach of contract and requesting equitable or declaratory relief.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10) on the bases that the circumstances surrounding Green's death do not qualify as an injury under the policy language and that the cause of her death is excluded from coverage under the policy. The accidental death benefit section of the policy states:

When we receive due proof that a Covered Person dies, we will pay the benefit shown on the Schedule of Benefits to his named Beneficiary; provided:

- (1) Death occurs as a direct result of any Injury; and
- (2) Death occurs with[in] 365 days of the accident causing the Injury.

The definition of injury is provided in the definitions section of the policy:

INJURY means bodily injury caused by an accident. The accident must occur while the Covered Person's insurance is in force under the Group Policy. The Injury must be the direct cause of loss and must be independent of all other causes. The Injury must not be caused by or contributed to by Sickness, Illness or Disease.

In the exclusions section, the policy states in pertinent part:

We will not pay a benefit for a loss which is caused by, results from, or [is] contributed to by:

* * *

(4) Sickness or its medical or surgical treatment, including diagnosis[.]

In support of its motion, defendant provided a number of documents, including records from the doctor that performed the colonoscopy. His notes indicate that Green was referred to him "for new onset constipation and anemia" and he recommended a colonoscopy, which he later performed. Defendant provided the Wayne County Medical Examiner's Office's postmortem summary and opinion, in which a deputy medical examiner opined that the cause of Green's death is unknown. Following a review of Green's medical record and the autopsy report, plaintiffs' own expert, Miles J. Jones, M.D., indicated that "To a reasonable degree of medical certainty, Mrs. Green died as a result of hypoglycemic coma. Her manner of death is best characterized as a consequence of medical treatment." Dr. Jones noted that Green was an insulin dependent juvenile diabetic and therefore was required to take insulin daily. He also noted that the medical records from the colonoscopy failed to instruct Green on adjusting her insulin intake in the twenty-four hour period before and after the colonoscopy. According to Jones, Green "died as a result of hypoglycemia due to continued normal insulin utilization in the face of significantly decreased or absent caloric intake for a period of 48 hours."

In response to defendant's motion for summary disposition, plaintiff provided an affidavit of a gastroenterologist, William M. Bisordi, M.D., F.A.C.P. Having reviewed the pertinent medical records, Dr. Bisordi opined that Green did not die due to anemia, her diabetic condition, or both, or the colonoscopy procedure, or due to a sickness, nor the medical or surgical treatment of sickness; rather, her death was due to the failure of the doctor who performed the colonoscopy "to follow the accepted standard of care, which required [that doctor] to stabilize Ms. Green's diabetes prior to performance of the colonoscopy, and an adjustment of her insulin dose prior to and subsequent to the colonoscopy," and that "caused Ms. Green to sustain a hypoglycemic injury resulting in death."

After a hearing on the motion, the trial court concluded that "Green's diabetes contributed to her death" and that "[t]he medical malpractice of the physician is not accidental bodily injury as defined in the policy" and granted summary disposition on those bases and, in addition, on the basis of the exclusion.

On appeal, plaintiffs argue, in essence, that the trial court erred in granting summary disposition in favor of defendant because they produced an affidavit from an expert giving a medical opinion that placed Green's death within the coverage of the insurance policy, which is

contrary to defendant's position. Plaintiffs appear to assert that the trial court erred in making a finding of fact concerning the cause of Green's death and that causation is a factual question for the trier of fact, not a question of law.

We review de novo the trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Likewise, the proper interpretation and application of an insurance contract is reviewed de novo. *Cohen v Auto Club Ins Ass'n*, 463 Mich 525, 528; 620 NW2d 840 (2001). In evaluating a motion for summary disposition brought under MCR 2.116(C)(10), "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion" to determine whether a genuine issue regarding any material fact exists. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). If the nonmoving party fails to present evidentiary proofs showing a genuine issue of material fact for trial, summary disposition is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456, n 2; 597 NW2d 28 (1999).

When presented with a dispute concerning an insurance policy, a court must determine what the parties' agreement is and enforce it. *Engle v Zurich-American Ins Group (On Remand)*, 230 Mich App 105, 107; 583 NW2d 484 (1998). To determine whether an event is covered by an insurance policy, a court must first consider whether the event is within the scope of the policy coverage before considering whether the event is otherwise excluded by the policy. *Fire Ins Exchange v Diehl*, 450 Mich 678, 683; 545 NW2d 602 (1996). The terms of the insurance contract determine the scope of the coverage. *Id.* If an insurance contract's language is clear, it must be enforced as written. *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). Ambiguities are to be construed against the insurer and in favor of the insured. *Wilkie v Auto-Owners Ins Co*, 245 Mich App 521, 524; 629 NW2d 86 (2001). Further, exclusionary clauses are to be strictly construed against the insurer, *Fire Ins Exchange, supra* at 687; *Twichel v MIC General Ins Corp*, ___ Mich App ___, ___ NW2d ___ (#228363, rel'd 5/31/02), but clear and specific exclusions must be enforced, *Trierweiler v Frankenmuth Mut Ins Co*, 216 Mich App 653, 657; 550 NW2d 577 (1996). If a word or phrase in an insurance contract is unambiguous and no reasonable person could differ with respect to application of the term or phrase to the undisputed material facts, then summary disposition under MCR 2.116(C)(10) should be granted to the proper party. *Henderson, supra* at 353. If reasonable minds could disagree about the conclusions to be drawn from the facts, a question for the factfinder exists and summary disposition is not appropriate. *Id.*

Here, the insurance policy unambiguously provides that benefits will be paid when "[d]eath occurs as a direct result of Injury" and defines injury to mean "bodily injury caused by an accident." The definition further provides that "[t]he Injury must be the direct cause of loss and must be independent of all other causes. *The Injury must not be caused by or contributed to by Sickness, Illness or Disease.*" [Emphasis supplied.] Given the medical evidence in this case, reasonable minds cannot differ with respect to the application of the contract language to the undisputed material facts. Clearly, diabetes is a sickness, illness or disease, and plaintiffs' own medical experts opined that the requirements for the colonoscopy procedure combined with her insulin dependent condition and the alleged malpractice of the doctor performing the procedure and contributed to Green's death.

Even if we were to assume that the circumstances here equate with the definition of injury contained in the policy, the exclusion concerning “[s]ickness or its medical or surgical treatment, including diagnosis” applies in these circumstances. Green consulted with her treating physicians complaining of constipation and the colonoscopy was utilized as a diagnostic tool, the preparation for which and the result of which plaintiffs’ experts opined conflicted with her normal insulin intake due to diabetes and contributed to her death. The trial court properly granted summary disposition in favor of defendant.

Affirmed.

/s/ Peter D. O’Connell
/s/ Richard Allen Griffin
/s/ Joel P. Hoekstra